

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
ONE ASHBURTON PLACE: ROOM 503
BOSTON, MA 02108
(617) 727-2293

GLENNIS OGALDEZ,
Appellant
v.

D1-13-74

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Cynthia Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Glennis Ogaldez (“Ogaldez” or “Appellant”) appealed on March 14, 2013 to the Civil Service Commission (“Commission”), from the decision of the Department of Correction (“DOC” or “Respondent”), to terminate her employment from the position of Correction Officer (“CO”). A pre-hearing conference was held on April 16, 2013 and a full hearing was held over the course of two days on June 27, 2013 and July 19, 2013 at the offices of the Commission. On July 17, 2013, the Appellant filed a Motion In Limine (“Motion”) to prevent testimony of Deputy Superintendent Douglas Demoura and the

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

Motion was denied on July 19, 2013. The hearing was digitally recorded and copies of the recording were forwarded to both parties. Post-hearing briefs were filed by the Respondent on August 20, 2013 and by the Appellant on August 21, 2013. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT:

Nineteen (19) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Respondent:

- James Morrone, Director of Security, DOC
- Stephen Vassalli, Lieutenant, DOC
- Brian Foley, Lieutenant, DOC
- Cheryl Brannon, Personnel Officer II, Human Resources, DOC
- Anderson Jemmott, Correction Officer, DOC
- Crystal Johnson, Sergeant, DOC
- Douglas Demoura, Deputy Superintendent, DOC

For the Appellant:

- Glennis Ogaldez, Appellant

and taking administrative notice of all matters, and all rulings filed in the case and pertinent statutes, regulations, case law and policies, a preponderance of the credible evidence, and reasonable inferences therefrom, establishes the following:

1. Ogaldez was a CO with the Boston Prerelease Center (“BPRC”). She began employment at DOC in 1998. Ogaldez has been at BPRC for six (6) years and prior to working at BPRC she worked at the Lemuel Shattuck Hospital Correction Unit, Massachusetts Correctional Institution (“MCI”) Longwood, and MCI Concord. (*Testimony of Ogaldez*)

2. Ogaldez has a disciplinary history dating back to 2002. In May 2002, Ogaldez received a written reprimand for habitual tardiness; in April 2004, she received a written reprimand for failure to report to an assigned post and becoming argumentative when questioned; in October 2004, she received a written reprimand for failure to provide medical evidence while on sick leave; in May 2005, she received a written reprimand for failure to provide medical evidence while on sick leave; in July 2005, she received a one-day suspension for losing a radio case, failing to report to a supervisor, and filing a false incident report; in August 2005, she received a three-day suspension for refusing a direct order to sign post orders three (3) times and lying during her hearing; in September 2005, she received a one-day suspension for failing to provide satisfactory medical evidence while on sick leave; in November 2005, she received a written reprimand for habitual tardiness; in January 2006 she received a five-day suspension that was reduced to two and a half day suspension for refusing several direct orders to report to the Captain's office, behaving in a loud and disrespectful manner, and making derogatory comments; in February 2007, she received a ten-day suspension that was reduced to a five-day suspension for insubordination toward a sergeant, and refusing a lieutenant's direct order to write an incident report; and in September 2008, she received a three-day suspension for insubordination to superior officers. (*Exhibit 5*)
3. Ogaldez has previously filed two appeals to the Commission which were dismissed based upon voluntary withdrawal on July 23, 2008. (Administrative Notice: Ogaldez v. DOC, D-07-115; Ogaldez v. DOC, D-06-22)
4. In a letter dated September 8, 2008, Ogaldez received notice that she was receiving a three-day suspension for insubordination. This letter also states, in part, "I am issuing a

final warning; any future violation of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction may result in your termination from your employment with the Department.” This letter was sent via first-class mail. (*Exhibit 8*) On September 23, 2008, Deputy Demoura hand delivered CO Ogaldez a letter which detailed which three days she would serve her suspension.

(*Testimony of Demoura; Exhibit 7*)

5. On September 4, 2012 Ogaldez was assigned to work the 11:00 p.m. to 7:00 a.m. shift at BPRC and proceeded to the control room when she began her shift. (*Testimony of Ogaldez*)
6. At the beginning of Ogaldez’s shift on September 4, 2012, there was an incident taking place between CO Rigaubert Aime, Lt. Foley, and CO Jemmott. CO Aime was visibly upset and angry and was yelling at Lt. Foley, complaining about CO Jemmott. (*Testimony Foley and Jemmott*). Ogaldez attempted to calm down CO Aime until Lt. Vassalli entered and ordered CO Aime and Ogaldez to the shift commander’s office. (*Testimony of Ogaldez and Vassalli*)
7. While in the shift commander’s office, Ogaldez was still attempting to calm down CO Aime. (*Testimony of Vassalli and Ogaldez*). CO Aime continued to complain about CO Jemmott and Lt. Foley. Ogaldez then stated, “Brian needs to...” referring to Lt. Foley before being cut off by Lt. Vassalli, telling her that he would not allow her to speak condescendingly about another lieutenant. Ogaldez then responded “I’m not trying to put you in the witness protection program. I’m too smart for that. I know what I’m doing.” Lt. Vassalli then ordered both CO Aime and Ogaldez to return to work. (*Exhibit 3, p. 82*)

8. Shortly after Lt. Vassalli ordered CO Aime and Ogaldez to return to their posts, CO Aime returned to the control room and requested that he be allowed to leave work early. After a heated discussion between CO Aime and Lt. Foley, CO Aime called Ogaldez to come to the control room to be a witness. Lt. Foley subsequently allowed CO Aime to leave work early. (*Testimony of Foley and Vassalli*)
9. At 11:30 p.m., the officers on shift conducted a count of the inmates. The first floor count was originally supposed to be done by Lt. Foley and CO Aime but, since CO Aime left work early, CO Jemmott conducted the first floor count. Because of prior issues with Ogaldez, CO Jemmott told Lt. Vassalli he was uncomfortable conducting the second floor count with Ogaldez. Lt. Vassalli then informed Lt. Foley to let Ogaldez know that she was to remain on the second floor and that Lt. Vassalli would conduct the second floor count with her. (*Testimony of Vassalli*)
10. Lt. Foley informed Ogaldez that he and CO Jemmott would perform the first floor count and ordered her to return to her post on the second floor. Instead, Ogaldez stayed on the first floor and watched as CO Jemmott conducted a count of the first floor. The three of them then began to walk to the other side of the floor and Lt. Foley told Ogaldez to return to her post on the second floor a second time. CO Jemmott heard Lt. Foley so order Ogaldez.² Ogaldez then sat down in a chair on the first floor while Lt. Foley and CO Jemmott finished the count of the first floor. As CO Jemmott walked back across the floor, Ogaldez stood up and stepped in front of CO Jemmott and remained there for a couple seconds before going to the second floor. Ogaldez and Lt. Vassalli then conducted a count of the second floor. (*Testimony of Foley and Jemmott*)

² Ogaldez and CO Jemmott have a history of unresolved problems that are not at issue here.

11. Lt. Foley immediately told Lt. Vassalli that he had ordered Ogaldez to return to her post twice and that she did not do so while he and CO Jemmott conducted the count of the first floor. (*Testimony of Foley*)
12. On September 5, 2012, an investigation was initiated at the request of Acting Chief of Internal Affairs, Duane MacEachern. Sgt. Johnson was the investigating officer. (*Exhibit 3, p. 10*)
13. On September 11, 2012, Ogaldez was detached with pay pending an investigation. (*Testimony of Ogaldez*)
14. An investigation report was put together by Sgt. Johnson documenting the allegation. (*Testimony of Johnson*). As a result of this investigation report, on December 4, 2012, Paul DiPaolo, the Acting Deputy Commissioner, found that Ogaldez's actions violated rules and regulations governing all employees of DOC, specifically, Rule 19(d). (*Exhibit 3*)
15. By letter dated December 7, 2012, Commissioner Luis Spencer sent Ogaldez a notice of charges and notice that a hearing date was scheduled for December 18, 2012. The notice states that the hearing was being convened as a result of the investigation that revealed the following: "... On or about September 4, 2012, your supervisor ordered you to leave the first floor due to a staff conflict between other officers on the shift, and return to your unit on the second floor at Boston Pre-Release. You failed to do so;" and "Subsequent to [these] actions... your supervisor specifically ordered you to return to your post, and you failed to do so." (*Exhibit 2*)

16. The purpose of the DOC hearing scheduled for December 18, 2012 was to determine if Ogaldez violated General Policy I and Rule 19(b).³ Ogaldez testified at the hearing, as did Lt. Vassalli, Lt. Foley, and Sgt. Johnson. (*Exhibit 2*) The DOC hearing officer was DOC Attorney Susan Herz. (*Exhibit 4*)
17. Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, General Policy 1 states, in part: “Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/her primary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment and full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations, and policy issued by the Commissioner, the respective superintendents, or by their authority.” (*Exhibit 1*)
18. Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, Rule 19(b) states: “Efforts will be taken to ensure that orders are reasonable and considerate, however, if you disagree with the intent or wording of an order, time permitting, you may be heard and the order withdrawn, amended, or it may stand, Without such prompt action on your part, no excuse will be tolerated that you did not comply with the order because it was faulty, unworkable, or for any other cause.” (*Exhibit 1*)
19. On January 14, 2013, the DOC hearing officer issued a decision that states that “more likely than not” Ogaldez failed to follow two direct orders from Lt. Foley and thus violated General Policy I and Rule 19(b). (*Exhibit 4*)

³ Acting Deputy Commissioner DiPaolo’s December 4, 2012 states found that Ogaldez violated Rule 19(d) and not 19(b). DOC terminated Ogaldez for violating Rule 19(b). Also, Rule 19(d) appears to relate to supervisors and, therefore, it appears that Acting Deputy Commissioner DiPaolo’s reference to Rule 19(d) in his December 4, 2012 letter was an error.

20. The DOC hearing officer found that Ogaldez was not credible. One of the significant reasons the DOC hearing officer found Ogaldez not credible is that she testified: “I’ve never disobeyed an order or disrespected an order from a superior officer.” The hearing officer wrote in her findings, “[t]his assertion flew in the face of Ogaldez’s Disciplinary History which shows Ogaldez was disciplined five (5) times for insubordination, including at least four (4) refusals to follow direct orders.” (*Exhibit 4*)
21. By letter dated March 6, 2013, Ogaldez received notice from Commissioner Luis Spencer that she violated General Policy I and Rule 19(b) and that, in light of her extensive prior disciplinary history and that she had received a final warning as a result of her September 5, 2008 discipline, her employment was being terminated, effective immediately. (*Exhibit 2A*)
22. Ogaldez filed this appeal on March 14, 2013.

DISCUSSION

Applicable Civil Service Law

G.L. c. 31, § 43, provides, in part:

... If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority....

Id.

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823

(2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682, 923, *rev. den.*, 426 Mass. 1102 (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, *rev. den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev. den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *rev.den.*, 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, *rev. den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, (1956).

“The commission’s task ... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact ... the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006). *See* Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102, (1983) and cases cited.

Analysis

DOC has proven by a preponderance of the evidence that it had just cause to terminate the employment of Ogaldez. This appeal has centered largely on testimony and credibility, especially Lt. Foley’s and Ogaldez’s testimony. In her testimony, the Appellant denied that Lt. Foley issued two orders to her on her shift that began on the night of September 4, 2012. She further denied that she received the 2008 letters stating the dates that her suspension at that time was to be served and that stated that any future rules violations by the Appellant may result in her termination. I do not find this credible as the first of the two letters was sent via first class mail and it may be presumed delivered. Ogaldez did not assert that her address had changed at or around that time. In addition, I think it unlikely that DOC would not have formally notified Ogaldez of the reasons for the discipline and possible further discipline. As for the second letter, Deputy Superintendent Demoura testified credibly that he hand delivered it to Ogaldez. Further, notwithstanding her considerable disciplinary history, including many instances of insubordination, as noted above, the Appellant stated at the DOC hearing in this case that she “... never disobeyed an order or disrespected an order from a superior officer.” Therefore, I find the Appellant’s credibility has been compromised.

Lt. Foley testified consistently and assuredly at the Commission that he gave Ogaldez two orders to return to her post and that she did not follow those orders. CO Jemmott testified, without reservation, that he was present and heard Lt. Foley's first order. He acknowledged that he did not hear Lt. Foley issue the second order but it appears that he was not within earshot of the Lt. Foley and the Appellant at that time. In addition, immediately after Lt. Foley conducted the inmate count on the night in question, Lt. Foley told Lt. Vassalli that he had twice ordered Ogaldez to return to her post and that she failed to do so both times.

In light of the foregoing, I find Lt. Foley more credible than Ogaldez and that a preponderance of the evidence supports Lt. Foley's report that he issued two orders to the Appellant on the night of her shift on September 4, 2012 and that she failed to obey his orders. There can be no question that following orders in DOC facilities is crucial to their efficient, safe and effective operation. Having twice refused Lt. Foley's orders on the night of September 4, 2012, Ogaldez's conduct constitutes substantial misconduct that adversely affects the public interest by impairing the efficiency of public service, not to mention undermining the safety and security of the correction officers and inmates.

The Appellant also argues that she was disciplined in a disparate manner. Adduced into evidence at the Commission's hearing is a chart (Exhibit 10) which has a list of unnamed officers who have been disciplined. There are seven officers on this chart who have received various disciplines for various reasons with one thing in common - they received a final warning but were not later terminated as a result of a subsequent discipline. However, the officers' full disciplinary history is unknown and, as far as it appears in the chart, none of them appear to have as extensive a disciplinary history as Ogaldez. Ogaldez has been disciplined eleven times prior

to her termination, including having been disciplined five times for insubordination, whereas most of the officers listed on the chart were disciplined twice and none of them have the same number of disciplines for insubordination as Ogaldez. As a result, I find that the Appellant was not treated in a disparate manner.

Conclusion

Based on the facts and the law herein, the Appellant's appeal under Docket No. D1-13-74 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on July 24, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty (30) day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Joseph Padolsky, Esq. (for Appellant)

Julie E. Daniele, Esq. (for Respondent)